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HAROLD B. WILLEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 264 Misc.

JOE HENDREX

Petitioner

v.

THE STATE OF MICHIGAN

Respondent

Brief in Opposition to a motion for leave to file a Petition for Extraordinary Writ of Certiorari

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INDEX

	Page
Argument	1
Conclusion	4

CASES CITED:

Albertson v. Millard, Attorney General, 345 US 242	3
Bankers Life & Casualty Co. v. Holland, 346 US 379	2–3
De Beers Consolidated Mines v. United States, 325 US 212	2
Dixon v. Duffy, 342 US 33	2
House v. Mayo, 324 US 42	3
In re Commonwealth of Massachusetts, 197 US 482	3
Ex parte Abernathy, 320 US 219	3
Ex parte Betz, 329 US 672	3
Ex parte Bollman and Swartwout, 4 Cranch 15	3
Ex parte Fahey, 332 US 258	3
Ex parte Hawk, 321 US 114	3
Ex parte Peru, 318 US 578	3
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 US 157	1
People of State of Michigan v. Daniel William Stanley, Mich. Sup. Ct.	3
Roberts v. U. S. District Court, 339 US 844	3
Roche v. Evaporated Milk Assn., 319 US 21	2
U. S. Alkali Export Assn. v. United States, 325 US 196	3

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Argument

In substance what petitioner seeks here is a mandate to compel the Supreme Court of Michigan to grant an appeal in the case at bar.

The Petition for an Extraordinary Writ of Certiorari seeks such writ because the Supreme Court of Michigan denied an Application for Leave to Appeal from the Judgment and Sentence of the Recorder's Court for the city of Detroit.

We are of the view that petitioner had an adequate remedy by application for certiorari to the Recorder's Court for the City of Detroit,

Michigan-Wisconsin Pipe Line Co. v. *Calvert,* 347 US 157.

Title 28 USCA § 1651 (a) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In *Bankers Life & Casualty Co.* v. *Holland, Chief Judge,* 346 US 379 at p 382 it is said:

> "The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U. S. C. § 1651 (a). As was pointed out in *Roche* v. *Evaporated Milk Assn.,* 319 US 21, 26 (1943) the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' • • •
>
> "The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consolidated Mines* v. *United States,* 325 US 212, 217."

The Court will note that in *Dixon* v. *Duffy,* 342 US 33, 343 US 393, 344 US 143, the procedure followed was regular certiorari to the Supreme Court of California and not the supplementary review power conferred on the courts by Congress in the All Writs Act.

There is now pending in the Supreme Court of the State of Michigan on appeal from the Recorder's Court for the

City of Detroit the case of *The People of the State of Michigan* v. *Daniel William Stanley* challenging the constitutionality of Act 53 Public Acts of Michigan 1954 allowing Writs of Error as of right in criminal cases, the question involved being one of local law. And the Supreme Court of Michigan should have the first opportunity of passing upon the constitutionality of a local law,

Albertson v. *Millard, Attorney General,* 345 US 242.

In the case of *In re Commonwealth of Massachusetts,* 197 US 482 this Court held that in cases over which this Court has no original or appellate jurisdiction it cannot grant prohibition, mandamus or certiorari as ancillary thereto.

The issuance by the Court of any writ authorized by 28 USCA § 1651 (a) is not a matter of right but of sound discretion sparingly exercised,

Ex parte Bollman and Swartwout, 4 Cranch 15,
Ex parte Peru, 318 US 578,
Ex parte Abernathy, 320 US 219,
Ex parte Hawk, 321 US 114,
House v. *Mayo,* 324 US 42,
U. S. Alkali Export Assn. v. *United States,* 325 US 196,
De Beers Consol Mines v. *United States,* 325 US 212,
Ex parte Betz, 329 US 672,
Ex parte Fahey, 332 US 258.

The writs, however, "are drastic and extraordinary remedies" to be "reserved for really extraordinary causes," in which "appeal is a clearly inadequate remedy." *Ex parte Fahey,* 332 US 258, 259, 260. *See* also *Bankers Life Co.* v. *Holland,* 346 US 379, 383; *Roberts* v. *U. S. District Court,* 339 US 844, 845. The Court allows them very sparingly.

See Supreme Court Practice (2d Ed) Stern and Gressman, page 280.

Conclusion

In our view the remedy sought here is inappropriate and the petition should be denied.

Respectfully submitted,

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